Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANK SARACO and 800 OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioners,

v.

THE UNITED STATES and GEORGE WEISE in his capacity as COMMISSIONER, UNITED STATES CUSTOMS SERVICE.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal district courts may assert jurisdiction pursuant to 28 U.S.C. 1331, and independent of the Tucker Act, where monetary claims are brought against the United States under a statute, such as the Fair Labor Standards Act, that provides its own waiver of sovereign immunity.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding below were Frank Saraco, 800 other similarly situated individuals, whose names are set forth in Pet. App., *infra* at 39a to 49a, the United States, George Weise, in his capacity as the Commissioner of the United States Customs Service, and James King, in his capacity as the Director, Office of Personnel Management.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Frank Saraco and 800 other similarly situated individuals, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is published at 61 F.3d 863. The order of the court of appeals denying a petition for rehearing (*id.* at 9a-10a) is not published. The opinion of the district court (*id.* at 11a-35a) is published at 831 F. Supp. 1154.

JURISDICTION

The order of the court of appeals denying a petition for rehearing was entered on September 22, 1995. The time for filing a petition for a writ of certiorari was first extended from December 21, 1995 to January 11, 1996, and then to January 25, 1996, by Orders of Circuit Justice Rehnquist. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. 1331; 28 U.S.C. 1346(a)(2); and 29 U.S.C. 216(b). They are set forth in Pet. App., *infra*, at 50a-51a.

STATEMENT

1. The petitioners in this action are some 800 Customs Inspectors and Import Specialists who brought suit in the United States District Court for the Eastern District of Pennsylvania under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").[1] Petitioners sought reclassification of their positions from "exempt" to non-exempt status. They also sought to recover overtime pay improperly withheld from them by their employer, the U.S. Customs Service ("Customs"). The petitioners alleged jurisdiction in the district court on the basis of section 16(b) of the FLSA, 29 U.S.C. 216(b), and 28 U.S.C. 1331.

Shortly after suit was filed, the government defendants moved to dismiss the case or in the alternative to transfer it to the Court of Federal Claims. Among other things, the government alleged that the district court lacked jurisdiction because the plaintiffs did not waive their rights to recover in excess of $10,000, as is required for the dis-

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[1] A list of the employees who filed consents to opt-in to the lawsuit as plaintiffs is contained in Pet. App. 39a-49a, *infra*.

trict court, rather than the Court of Federal Claims, to assert jurisdiction under the Tucker Act, 28 U.S.C. § 1346 (a)(2). The government also argued that venue was not properly laid in the Eastern District of Pennsylvania under the Tucker Act's venue provision, 28 U.S.C. 1402(a), as to those plaintiffs who did not reside in that judicial district.

2. The district court granted the government's motion and transferred the case to the Court of Federal Claims. It held that the Tucker Act (28 U.S.C. § 1346(a)(2)) is the exclusive basis for district court jurisdiction over FLSA claims against the United States. Pet. App. 17a-25a. It also agreed with the government's contention that venue over an FLSA case brought by plaintiffs from more than one judicial district could only lie in the Court of Federal Claims. *Id.* at 26a-29a. The court concluded, therefore, that any amendment of the complaint to waive damages in excess of $10,000 would be futile. *Id.* at 27a.

3. After the district court denied a motion for reconsideration (Pet. App. 36a-38a), the petitioners noted an appeal of the court's order of transfer with the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. 1292(d)(4)(A). They argued that, under *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988), the Tucker Act is not the exclusive basis for district court jurisdiction over monetary claims against the government where an independent statutory basis for district court jurisdiction can be asserted. Relying on *Bowen* and precedent in other circuit courts construing identical statutory language, petitioners contended that the federal question statute, 28 U.S.C. § 1331, and section 16(b) of the FLSA—which allows suits against the United States "in any court of competent jurisdiction"—provided such an independent statutory basis for district court jurisdiction in this case.

The Federal Circuit affirmed the district court and rejected petitioners' arguments on the basis of its earlier

decision in *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985). *Zumerling* had held that section 16(b) of the Fair Labor Standards Act does not confer jurisdiction on the district courts to hear FLSA claims brought against the United States. As the court below noted, in *Zumerling*, it had concluded "that the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity; but that only the Tucker Act provided jurisdiction of suits to enforce that right." Pet. App. 5a.

Zumerling, a pre-*Bowen* decision, did not, however, consider whether 28 U.S.C. 1331 (in conjunction with the FLSA's waiver of sovereign immunity) conferred jurisdiction on the district court. The court of appeals, nonetheless, rejected the contention that *Bowen* warranted that it reach a different result than that reached in *Zumerling*. It noted that *Bowen* was distinguishable because the plaintiff there was seeking relief other than money damages. Pet. App. 6a. The Federal Circuit acknowledged that other circuits had held that the term "court of competent jurisdiction" would "assign jurisdiction outside the Tucker Act for money claims against the United States." Pet. App. 6a-7a, citing *C.H. Sanders Co. v. BHAP Housing Development Fund Co., Inc.*, 903 F.2d 114 (2d Cir. 1990) and *Hubbard v. Environmental Protection Agency*, 982 F.2d 531 (D.C. Cir. 1992) (*en banc*). Notwithstanding this "divergence of judicial opinion against the government . . ." (Pet. App. 7a), the Court concluded that under *Zumerling*, which is the law of the Federal Circuit, the Tucker Act provides the exclusive basis for district court jurisdiction over FLSA claims against the United States.

The court, accordingly, affirmed the district court's order of transfer. It subsequently denied petitioners' request for rehearing. Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

This case raises an important issue of federal court jurisdiction upon which the circuit courts are in conflict. The Federal Circuit's ruling that the Tucker Act provides the exclusive jurisdictional basis for FLSA claims against the federal government is inconsistent with *Bowen v. Massachusetts*. Further, the decision conflicts directly with the Second Circuit's decision in *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994), finding district court jurisdiction pursuant to 28 U.S.C. 1331 over federal employees' statutorily-based claims for backpay. The Federal Circuit's decision also conflicts with the decisions of the Fourth, Eighth, and D.C. Circuits, interpreting statutory language that is virtually identical to that contained in the FLSA. This Court's review is warranted to resolve the conflict. Resolution of the question presented has important implications for federal court jurisdiction and for enforcement of the FLSA in the federal sector.

1. The Tucker Act establishes the jurisdiction of the Court of Federal Claims to hear claims against the United States that are based upon the Constitution, upon a statute, upon an executive regulation, or upon a contract. 28 U.S.C. 1491. The "Little Tucker Act," 28 U.S.C. 1346(a)(2), gives the district courts concurrent jurisdiction over such claims, when they do not exceed $10,000. The Tucker Act serves as a catch-all provision that waives the sovereign immunity of the United States for these claims. *United States v. Mitchell*, 463 U.S. 206, 216 (1983).[2]

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[2] Because the Tucker Act is a catch-all provision, to bring suit, an individual with a claim for money damages against the United States must also be able to identify a source of substantive law that " 'can fairly be interpreted as mandating compensation by the federal government for the damage sustained'." *United States v. Testan*, 424 U.S. 392, 400 (1976), *quoting Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

In *Bowen v. Massachusetts*, this Court clarified that, although it was "often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000 . . . [t]hat assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court." Tucker Act jurisdiction, the Court explained, is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910, n.48.[3]

Employees with FLSA claims against the federal government need *not* rely upon the general grant of jurisdiction in the Tucker Act to supply the federal government's consent to be sued. Section 16(b) of the FLSA provides that "any employer who violates [the minimum wage and overtime provisions of the FLSA] shall be liable to the employee or the employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional amount as liquidated damages" and authorizes employees to bring suit against "any employer (including a public agency) in any Federal or State court of competent jurisdiction." 28 U.S.C. 216(b).

Section 1331 of Title 28, in turn, establishes that federal district courts are courts of "competent jurisdiction" to hear FLSA claims, by giving them original jurisdiction over claims that arise under the laws of the United States. The catch-all Tucker Act, therefore, is not a

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[3] Thus, *Bowen* rejects the reasoning of decisions like *Graham v. Henegar*, 640 F.2d 732 (5th Cir. 1981), which the *Zumerling* court cited. *See* 769 F.2d at 748. Ruling that FLSA claims against the federal government must be heard by the Claims Court where they exceed $10,000, *Graham* opined that the Tucker Act is the exclusive basis for jurisdiction over all non-tort claims against the United States that exceed $10,000, "even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court." 640 F.2d at 734.

necessary basis for the exercise of jurisdiction by the district court.[4]

2. The Federal Circuit's decision is in square conflict with *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994). That case, like this one, involved a claim for backpay brought against the United States as an employer on the basis of the violation of a federal statute.

In *Ward*, the Second Circuit held that the district court had jurisdiction over a claim for backpay exceeding $10,000 brought by a plaintiff challenging his discharge on constitutional and statutory grounds. The court of appeals reasoned that the plaintiff had raised a federal question, invoking 28 U.S.C. 1331, and that the Back Pay Act, 5 U.S.C. 5596, provided an independent waiver of the immunity of the United States, obviating the need to rely upon the Tucker Act's waiver.

In so ruling, the Second Circuit explicitly rejected the Federal Circuit's decision in *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991), which had held (like *Zumerling*) that the Tucker Act serves as the exclusive basis for backpay claims brought by federal employees against the United States. *See* 22 F.3d at 520, citing *Mitchell*. As the *Ward* court explained, "regardless of the amount in controversy, an action in the district court is proper under the federal question statute, 28 U.S.C. 1331,

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[4] The Federal Circuit missed the point when it observed (Pet. App. 6a) that *Bowen* is "easy to distinguish" because the plaintiff there sought specific relief, as opposed to money damages. *Bowen* discussed the distinction between money damages and specific relief at some length because the Administrative Procedure Act, which was relied upon by the plaintiff Massachusetts, waived the federal fovernment's sovereign immunity only for the latter, and not for money damages. The court of appeals failed to appreciate *Bowen*'s conclusion that *even if* a plaintiff could obtain money damages under the Tucker Act, he could still have recourse to federal district court where Congress provides an independent basis for such jurisdiction.

if a statute other than the Tucker Act provides the necessary waiver of sovereign immunity." *Id.* at 519. "Thus," the court observed, "although an action could have been brought in the Court of Federal Claims under the Tucker Act, a district court has jurisdiction over the case so long as there is both a grant of subject matter jurisdiction and an independent waiver of sovereign immunity." *Id.*

3. As the Federal Circuit itself recognized (Pet. App. 7a), its ruling also conflicts with a number of decisions (both before and after *Bowen*) that have found an independent basis for district court jurisdiction in 28 U.S.C. 1331 where a statute allows suit against the federal government "in any court of competent jurisdiction."

a. For example, in a pre-*Bowen* decision—*Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976)—the D.C. Circuit held that section 1702 of the National Housing Act (12 U.S.C. 1702), which authorizes the Secretary of Housing and Urban Development to "sue or be sued in any court of competent jurisdiction, State or Federal," established a waiver of the federal government's sovereign immunity. In light of that independent waiver, the court ruled that the district court could exercise jurisdiction over claims that would otherwise be based on the Tucker Act, by virtue of either its diversity jurisdiction (28 U.S.C. 1332) or federal question jurisdiction (28 U.S.C. 1331). 551 F.2d at 376-77. The Eighth Circuit later came to the same conclusion. *See Bor-Son Building Corporation v. Heller*, 572 F.2d 174, 181-82 (8th Cir. 1978) (relying upon 28 U.S.C. 1442(a)(1) as the basis of district court jurisdiction).[5]

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[5] *See also Ferguson v. Union National Bank of Clarksburg*, 126 F.2d 753 (4th Cir. 1942) (relying upon section 1331); *Ghent v. Lynn*, 302 F. Supp. 879 (D. Conn. 1975) (National Housing Act waives sovereign immunity by permitting suit against Secretary in

On the other hand, the Ninth Circuit, like the Federal Circuit here, had held Tucker Act jurisdiction exclusive even where a statute makes the government subject to suit in a "court of competent jurisdiction," if the statute does not specify jurisdiction in the district court. *See Munoz v. Small Business Administration,* 644 F.2d 1361, 1365 n.3 (9th Cir. 1981), citing *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.,* 595 F.2d 1126 (9th Cir. 1979); *Pacificorp v. Federal Energy Regulatory Commission,* 795 F.2d 816, 825-827 (9th Cir. 1986) (Wallace, J. concurring). Thus, even before this Court's ruling in *Bowen,* "the circuits appear[ed] to be split on the question of whether the Tucker Act will limit section 1331 jurisdiction where another statute has been construed as a waiver of sovereign immunity." *Spectrum Leasing Corporation v. United States,* 764 F.2d 891, 895 n.8 (D.C. Cir. 1985).

b. Since *Bowen,* the Second and Eleventh Circuits, and now the Federal Circuit, have weighed in, deepening the conflict. In *C.H. Sanders Co. v. BHAP Housing Development Fund Co., Inc.,* 903 F.2d 114 (2d Cir. 1990), the Second Circuit, relying upon *Bowen,* held that the sue and be sued clause of section 1702 of the Housing Act constituted a waiver of the federal government's sovereign immunity and that the federal question statute conferred jurisdiction on the district court. *C.H. Sanders,* a decision later found controlling as to federal employee backpay claims in *Ward* (22 F.3d at 519), specifically rejected the government's argument that the Tucker Act displaces an otherwise valid exercise of federal question jurisdiction in the district court. *Id.* at 119-120. The

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"any court of competent jurisdiction;" 28 U.S.C. 1331 establishes jurisdiction in district court); *cf. Portsmouth Redevelopment and Housing Authority v. Pierce,* 706 F.2d 471, 475 (4th Cir.), *cert. denied,* 464 U.S. 392 (1983) ("sue and be sued" statute does not give district courts jurisdiction because it does not contain language "in any court of competent jurisdiction, State or Federal").

court held that section 1331 jurisdiction may be asserted over a claim in district court, "provided there is an independent waiver of sovereign immunity outside the Tucker Act." *Id.* at 119.

The decision of the Federal Circuit below (and the Eleventh Circuit in *Parker v. King*[6]) holds that the Tucker Act is exclusive because the FLSA itself does not vest jurisdiction in the district court. Those decisions conflict directly with *C.H. Sanders* and with the pre-*Bowen* decisions cited above, such as *Trans-Bay*.

Thus, the FLSA contains the same operative language as section 1702 of the Housing Act (addressed in those cases)—permitting the United States to be sued "in any court of competent jurisdiction, State or Federal." 29 U.S.C. 216(b). As even the Federal Circuit recognized below (Pet. App. 5a), this FLSA language waives the government's immunity to suit. Under the decisions of the Second and D.C. Circuits, that waiver of sovereign immunity, in conjunction with the federal question statute, provided an independent basis for the exercise of jurisdiction by the district court.

4. As shown, the Federal Circuit's ruling below is in direct conflict with the Second Circuit's decision in *Ward v. Brown*, which found district court jurisdiction over federal employees' backpay claims under the federal question statute where, as here, another statute waives the government's immunity from suit. The Federal Circuit's ruling also conflicts with the decisions of several circuit courts holding Tucker Act jurisdiction not exclusive where a federal question is presented and the action is brought pursuant to a statute, like the FLSA, that subjects the United States to suit "in any court of competent jurisdiction."

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[6] 935 F.2d 1174 (11th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992).

This Court's review is needed to resolve the conflict. As Justice Scalia has observed, "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. at 930 (dissenting opinion). That waste of the parties' time and of judicial resources will continue, unless this Court provides guidance.

Further, the jurisdictional question upon which the circuit courts are in conflict is an important one. The exclusivity of the Tucker Act affects whether the district courts can assert jurisdiction in cases where claims against the United States exceed $10,000. It also determines, as in this case, the appropriate venue provision to apply in district court and the proper appellate tribunal.

a. As a consequence of the Court's ruling that the Tucker Act is the exclusive basis for federal court jurisdiction over the FLSA claims of federal employees, plaintiffs in FLSA cases will, more often than not, find themselves forced to litigate their claims in Washington, D.C. in the Court of Federal Claims. The general venue provision—28 U.S.C. 1391(e)(4)—permits plaintiffs residing in different districts to participate in a single action against the federal government in any district in which at least one of the plaintiffs resides. *E.g., Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 898-99 (3d Cir. 1978). It has been held, however, that (as the district court found in this case—Pet. App. 26a-29a) the Tucker Act's venue provision (28 U.S.C. 1402(a)(1)) requires *all* plaintiffs to reside in the district where Tucker Act venue is laid.[7]

FLSA suits against the federal government virtually always include plaintiffs residing in more than one judicial district. Under the FLSA, plaintiffs can join together in suit against their employer by filing consents and opting-in to the lawsuit. If the Tucker Act is the exclusive basis for jurisdiction and its venue provision applies,

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[7] *Brooks v. Weinberger*, 637 F. Supp. 22, 24 (D.D.C. 1986); *Davila v. Weinberger*, 600 F. Supp. 599, 601 (D.D.C. 1985).

then employees cannot join together in a single suit unless they come to Washington, D.C., where the Court of Federal Claims is located.

That result will undermine employees' ability to vindicate their FLSA rights collectively by denying them the most convenient forum. Further, by discouraging employees from joining together to file suit, it would defeat Congress' intent to consolidate like FLSA claims against a single defendant, and instead promote redundant claims in multiple forums.

b. Finally, the purposes of the FLSA are ill-served by centralizing the appeals process. In granting the court of appeals for the Federal Circuit exclusive jurisdiction over patent and other specialized subject matter cases, as well as cases that arise in whole or in part under the Tucker Act, Congress' motivating concern was to promote uniformity in certain areas of the law. *United States v. Hohri*, 482 U.S. 64, 71-72 (1987). Its aim was to create an appellate tribunal that could supply, in these areas, "reasonably quick and definitive answers to legal questions of nationwide significance." S. Rep. No. 275, 97th Cong., 2d Sess. (1982) at 3.

These rationales do not apply to FLSA cases. In extending the FLSA to the federal sector, Congress intended, not to create a specialized body of law, but to insure that the FLSA be interpreted in a manner consistent with its application in the private sector. *See American Federation of Government Employees v. Office of Personnel Management*, 821 F.2d 761, 769-71 (D.C. Cir. 1987). Resolution of FLSA cases in the federal sector, like the resolution of claims under Title VII of the Civil Rights Act or other similar remedial legislation, requires application of the same principles that the regional circuits apply to private sector cases; the Federal Circuit can develop no particular ability to provide definitive answers to FLSA questions, as it can with patent issues or federal contract questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1073

FRANK SARACO and
800 similarly situated individuals,
Plaintiffs-Appellants,

v.

THE UNITED STATES and CAROL BOYD HALLETT
in her capacity as
COMMISSIONER, UNITED STATES CUSTOMS SERVICE,
Defendants-Appellees.

DECIDED: July 28, 1995

Before ARCHER, *Chief Judge,* NEWMAN and MICHEL,
Circuit Judges.

NEWMAN, *Circuit Judge.*

Frank Saraco and 800 similarly situated individuals appeal the decision of the United States District Court for the Eastern District of Pennsylvania, transferring this case to the United States Court of Federal Claims.[1] This appeal is taken in accordance with 28 U.S.C. § 1292 (d)(4)(A), which assigns to the Federal Circuit exclusive

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[1] *Saraco v. Hallett*, No. 91-5629 (E.D. Pa. Aug. 3, 1993).

jurisdiction of interlocutory appeals of the issue of jurisdiction as between the district court and the Court of Federal Claims.

BACKGROUND

Appellants are Customs Inspectors and Import Specialists who are classified as employed in an "administrative capacity" within the meaning of 29 U.S.C. § 213 (a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. They are considered "exempt" employees for the purposes of the FLSA. The gravamen of their suit is that they are improperly classified as exempt, and that this classification impairs their right to compensation for overtime work. In Count I they challenge their classification under the applicable regulations of the Office of Personnel Management, and seek back pay and liquidated damages as provided by the FLSA. In Count II they challenge the validity of OPM's classification regulations in administration of the FLSA.

The district court, on motion of the government, transferred Count I to the Court of Federal Claims. Rejecting the appellants' position that the appropriate jurisdictional statute is § 216(b) of the FLSA, the district court held that only the Tucker Act grants jurisdiction of such suits against the United States. Tucker Act suits for amounts in excess of $10,000 can be brought only in the Court of Federal Claims:

> 28 U.S.C. § 1491(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"Little" Tucker Act suits, for claims not exceeding $10,000, can be brought in the district courts:

> 28 U.S.C. § 1346(a)(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, . . . [except for claims subject to] the Contract Disputes Act of 1978.

28 U.S.C. § 1402(a)(1) provides that claims brought under section 1346(a), other than by a corporation, may be prosecuted only in the judicial district where the plaintiff resides.

The district court denied the appellants' motion to amend their complaint to limit to $10,000 the damages sought by each plaintiff, an opportunity that is usually granted to Tucker Act plaintiffs who wish to remain in the district court. The district court ruled that venue was improper as to those plaintiffs (a majority of the total) who reside outside of the Eastern District of Pennsylvania. The court explained that amendment of the complaint would be futile in light of the venue problem.

The district court also transferred Count II of the complaint. The court observed that although the Court of Federal Claims does not have original jurisdiction over the classification action, which was brought pursuant to the Administrative Procedure Act, that court does have power to afford complete relief:

> 28 U.S.C. § 1491(a)(2). To provide an entire remedy and to complete the relief afforded by the judgment, the [Court of Federal Claims] may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, . . . and such orders may be issued to any appropriate official of the United States.

Neither side challenges the correctness of the transfer of Count II, if Count I were properly transferred.

DISCUSSION

A waiver of governmental immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). When so expressed, however, it must be applied in accordance with its terms, and not reinterpreted contrary to congressional intent. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) ("Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.")

Appellants argue that the district court was incorrect in holding that the Tucker Act is the only statute conferring jurisdiction with respect to Count I. They argue that the intent of the Fair Labor Standards Act is clear, and that it confers jurisdiction on the district court without distinguishing between government and private employers, in that the FLSA authorizes suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction":

> 29 U.S.C. § 216(b) Damages; right of action; . . .
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Appellants argue that this provision authorizes suit in the district court because that court's federal question jurisdiction makes it a court "of competent jurisdiction" for actions under the FLSA, and that § 216(b) does not distinguish between private and public employers. The government's response is that only the Tucker Act confers jurisdiction for monetary claims against the government arising under the FLSA.

A

The question of jurisdiction is a recurring one in suits against the government. In *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985), federal firefighters challenged, in the district court, the government's method of calculating their overtime pay under the FLSA. The question was raised of whether the district court's jurisdiction was based on the Tucker Act or the FLSA, since that would determine whether claims in excess of $10,000 could be presented in the district court, as well as the path of appeal.

The Federal Circuit discussed the difference "between a law conferring a substantive right to recover money from the United States, and a law endowing a court with jurisdiction of suits to enforce that right," and held that these were distinct requirements, both of which must be satisfied. *Zumerling*, 769 F.2d at 749 (citing *United States v. Testan*, 424 U.S. 392 (1976)). *See also United States v. Mitchell*, 463 U.S. 206, 216 (1983). The court explained that the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity; but that only the Tucker Act provided jurisdiction of suits to enforce that right. Thus the court concluded that the Tucker Act was the applicable jurisdictional statute in the district court. *Zumerling*, 769 F.2d at 749.

Appellants invite us to reconsider *Zumerling*, suggesting that it was not correctly decided. Appellants suggest

that the correct reading of the FLSA is that it both waived sovereign immunity and provided an independent basis for the district court's jurisdiction, separate from the Tucker Act. Appellants point to the Supreme Court's reminder that:

> [W]aiver of sovereign immunity is accomplished not by "a ritualistic formula"; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy.

Franchise Tax Board v. United States Postal Service, 467 U.S. 512, 521 (1984) (quoting *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939)). However, the issue in this case is not whether governmental immunity from suit has been waived, for it explicitly has been. The issue is only in which federal court the authorized suit may be brought.

Appellants suggest that a change in viewpoint is reflected in the analysis of congressional intent in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), wherein the Court recognized that the district court may have jurisdiction of some monetary claims outside of the Tucker Act; and in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), wherein the Court held that the federal charter of the Red Cross, which authorized that organization "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States," conferred original jurisdiction on the federal district courts.

Although it is easy to distinguish the cause in *Bowen v. Massachusetts*, where the plaintiff was seeking relief other than money damages, from a claim under the Tucker Act; and it is readily seen that a suit against the Red Cross is not a suit against the United States; we take note that there are other instances in which the term "court of competent jurisdiction" has been interpreted to assign jurisdiction outside of the Tucker Act for monetary claims against the government. For example, in

C.H. Sanders Co. v. BHAP Housing Development Fund Co., 903 F.2d 114 (2d Cir. 1990), that court held that for actions under the National Housing Act, 12 U.S.C. § 1702, the district court had jurisdiction under 28 U.S.C. § 1331, and rejected the government's argument that the Tucker Act overrides federal question jurisdiction in the district court. In *Hubbard v. Administrator, E.P.A.*, 982 F.2d 531 (D.C. Cir. 1992) (*en banc*), that court held that a claim for pay by a person who was wrongfully denied employment was a claim for money damages and suit must be brought under the Tucker Act, adding that "We do not suggest that back pay must always be viewed as money damages and can never be properly categorized as specific relief." 982 F.2d at 533 n.4.

Divergence of judicial opinion concerning the jurisdiction of monetary claims against the government under various statutes is reflected in the many cases raising the threshold question of jurisdiction as between the district courts and the Court of Federal Claims. However, the Federal Circuit in *Zumerling v. Devine* held that jurisdiction of cases under the FLSA was provided only by the Tucker Act. *Zumerling* states the consistent law of the Federal Circuit. We have come upon no instances of circuit conflict in FLSA actions against the United States. *Zumerling* is in accord with *Testan* and *Mitchell, supra*, and is not inconsistent with *Bowen v. Massachusetts* or *American Red Cross*. It is binding precedent in this court. The district court correctly applied this precedent in transferring the case to the Court of Federal Claims.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1073

FRANK SARACO and
800 similarly situated individuals,
Plaintiffs-Appellants,

v.

THE UNITED STATES and CAROL BOYD HALLETT
in her capacity as
COMMISSIONER, UNITED STATES CUSTOMS SERVICE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
in Case No(s) 91-5629

JUDGMENT

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

Dated Jul. 28, 1995

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

ISSUED AS A MANDATE: September 29, 1995

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1073

FRANK SARACO and
800 similarly situated individuals,
Plaintiffs-Appellants,

v.

THE UNITED STATES and CAROL BOYD HALLETT
in her capacity as
COMMISSIONER, UNITED STATES CUSTOMS SERVICES,
Defendants-Appellees.

ORDER

Before ARCHER, Chief Judge, NEWMAN, Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT, a response thereto having been invited by the court and filed by the APPELLEE, and APPELLANT'S REPLY TO THE RESPONSE having also been filed by leave of the court,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 29, 1995.

Dated: September 22, 1995

FOR THE COURT,
FRANCIS X. GINDHART
Clerk

by /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

APPENDIX D

[Filed Aug. 4, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-5629

FRANK SARACO, HOWARD MARDER,
GARY LEVENSON, CHARLES DUBANO,
RICHARD BOLES, and STEVEN FOREMAN, *et al.*,
Plaintiffs

v.

CAROL BOYD HALLETT, *et al.*,
Defendants

MEMORANDUM

DUBOIS, J. August 3, 1993

Presently before the Court is Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint and Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the United States Court of Federal Claims (hereinafter "Court of Federal Claims") In the Alternative to Dismissal. For the reasons which follow, Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint will be denied and Defendants' Motion to Transfer Count I to the Court of Federal Claims will be granted. The Court will also transfer Count II of Plaintiffs' Third Amended Complaint to the Court of Federal Claims.

I. BACKGROUND

This action was commenced by the six named plaintiffs, employees of the United States Customs Service ("Customs Service"), on their own behalf, and on behalf of more than 700 similarly situated employees of the Customs Service who have filed consent forms to partici-

pate in this action as "opt-in" plaintiffs, alleging that the Customs Service violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, in the calculation of their overtime pay. The defendants are Carol Boyd Hallett, Commissioner of the United States Customs Service, Constance Berry Newman, Director of the Office of Personnel Management ("OPM"), and the United States of America, plaintiffs' employer.[1]

Plaintiffs are federal employees who are covered by the FLSA. *See* 29 U.S.C. § 203(e)(2)(A). In general, under the FLSA, employees are entitled to overtime pay at one and a half times their regular hourly rate of pay for hours worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). However, "any employee employed in a bona fide . . . administrative . . . capacity" is exempt from the overtime pay provision of section 207. *See* 29 U.S.C. 213(a)(1). Employees who are exempt from the FLSA's overtime provision receive overtime pay at a "capped" rate—one and a half times the rate of a level GS-10, step one employee—pursuant to the Federal Employment Pay Act ("FEPA"). *See* 5 U.S.C. § 5542 (a)(2). Plaintiffs assert that their regular hourly rate is higher than that of a level GS-10, step one employee. (Third Am. Compl. ¶ 15)

Plaintiffs were categorized as administrative employees within the meaning of section 213(a)(1) of the FLSA by the Customs Service pursuant to an OPM regulation which defines the term "administrative employee" and sets forth a primary duty test for determining whether an employee meets the administrative exemption. *See* 5 C.F.R. § 551.205.[2] Having been classified as administra-

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[1] Defendants Hallett and Newman are being sued only in their official capacities. (Third Am. Compl. ¶¶ 10, 11)

[2] The OPM regulation states in relevant part:

> An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or

tive employees, plaintiffs received overtime pay at the capped rate pursuant to FEPA, rather than at their regular hourly rate.

In Count I of their Third Amended Complaint, plaintiffs claim that the Customs Service improperly classified them as administrative employees under the OPM regulation and failed to pay them the proper rate of pay for overtime hours in violation of section 216(b) of the FLSA.[3] They contend that they do not meet the primary

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general business function or supporting service who meets all of the following criteria:

(a) The employees's primary duty consists of work that

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly nonmanual work which is—

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

5 C.F.R. § 551.205. Only the primary duty test set forth in subsection (a) is at issue in this case.

[3] Section 216(b) of the FLSA states in relevant part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No em-

duty test set forth in the OPM regulation and, therefore, are entitled to overtime pay at one and half times their regular hourly rate, not at the capped rate under FEPA, and liquidated damages equal to the amount of any overtime pay awarded.[4]

In Count II, plaintiffs ask the Court to declare that the OPM regulation which defines administrative employees is invalid. The focus of Count II is on the primary duty test set forth in the OPM regulation upon which the Customs Service relied in determining that plaintiffs are administrative employees. OPM is authorized to administer the FLSA with respect to individuals employed by the federal government. *See* 29 U.S.C. § 204(f). The Department of Labor ("DOL") administers the FLSA with respect to individuals employed in the private and non-federal public sectors. *See generally American Federation of Government Employees v. Office of Personnel Management*, 821 F.2d 761, 770 (D.C. Cir. 1987).

It is plaintiffs' position that OPM must exercise its rulemaking authority in a manner consistent with the Secretary of Labor's implementation of the FLSA, *see*

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ployee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

[4] Section 216(b) of the FLSA, which entitles an employee to recover liquidated damages, is modified by section 260 of that act. Section 260, which gives courts discretion in determining the amount of liquidated damages to award, if any, states in relevant part:

> In any action . . . to recover . . . unpaid overtime compensation . . . under the [FLSA] . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216.

American Federation of Government Employees, 821 F.2d at 770, and that, in violation of that requirement, the OPM regulation defining administrative employees is more broad than the comparable DOL regulations. *See* 29 C.F.R. § 541.2(a) and 541.205.[5] Continuing, plaintiffs contend they would not meet the primary duty test under DOL regulations, whereas the Customs Service has classified them as administrative employees under the OPM regulations. Accordingly, plaintiffs argue that, because they were classified as administrative employees under the more broad OPM regulation, whereas they would not have been so classified under the DOL regulations, the OPM regulation should be declared invalid.

Defendants move to dismiss plaintiffs' Third Amended Complaint on several grounds. First, defendants assert that the Court lacks jurisdiction to entertain plaintiffs' overtime claims which, when they arose, were subject to the negotiated grievance procedures set forth in the collective bargaining agreement between the Customs Service and Customs Service employees. Second, defendants assert that any overitme claims which are not subject to negotiated grievance procedures are within the exclusive jurisdiction of the Court of Federal Claims pursuant to the Tucker Act because they exceed $10,000.[6] Third, defendants assert that, with respect to claims which

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[5] 29 C.F.R. § 541.2 states in relevant part:

> The term 'employee employed in a bona fide . . . administrative . . . capacity' in section 13(a)(1) of the [FLSA] shall mean any employee:
>
> (a) Whose primary duty consists of either:
>
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers . . .
>
> (b) Who customarily and regularly exercises discretion and independent judgment . . . .

29 C.F.R. § 541.205 sets forth an expansive definition of the phrase "directly related to management policies" in section 541.2.

[6] See infra discussion of Defendants' Motion to Transfer Count I.

do not exceed $10,000, venue under the Tucker Act does not lie in this district because most of the opt-in plaintiffs do not reside in this district.[7] It is defendants' position that venue in the district court for such claims lies only in the district in which all plaintiffs reside. Because all plaintiffs do not reside in a single district, defendants argue that the suit should have been brought in the Court of Federal Claims. Thus, defendants ask the court to dismiss the action for improper venue. Finally, defendants assert that plaintiffs lack standing to challenge the OPM overtime regulation, or, alternatively, plaintiffs' allegation that the OPM regulation is invalid fails to state a claim upon which relief can be granted.

Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the Court of Federal Claims in the Alternative to Dismissal asserts that this Court lacks jurisdiction over plaintiffs overtime claims on the ground that the Court of Federal Claims has exclusive jurisdiction over non-tort claims against the United States for money damages in excess of $10,000. Therefore, defendants maintain, if not dismissed, Count I must be transferred to the Court of Federal Claims.

The Court need not address each of defendants' grounds for dismissal as the Court concludes that it lacks jurisdiction over plaintiffs claims for overtime pay and liquidated damages set forth in Count I, and will transfer Count I to the Court of Federal Claims pursuant to 28 U.S.C. 1631.[8] Jurisdiction over such claims is

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[7] As of the time of filing this action, all of the named plaintiffs resided in this judicial district. The opt-in plaintiffs, who filed consent forms to become parties plaintiff after the initial Complaint was filed, reside in numerous judicial districts.

[8] Section 1631 states in relevant part:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been

defined by the Tucker Act and, under that statute, where such claims exceed $10,000, they must be brought in the Court of Federal Claims.[9] Furthermore, under the venue provision applicable to Tucker Act claims which do not exceed $10,000, because many of the opt-in plaintiffs reside in other judicial districts, the action may only be brought in the Court of Federal Claims. *See* 28 U.S.C. §§ 1346 and 1402(a).

With respect to Count II, the Court concludes that plaintiffs have standing to challenge the OPM regulation at issue and have stated a claim upon which relief may be granted. The Court further concludes that the Court of Federal Claims is capable of affording plaintiffs complete relief. Accordingly, Count II will be transferred to that court.

III. DISCUSSION

A. *Jurisdiction Over Plaintiffs' Claims in Count I Lies In the Court of Federal Claims.*

Analysis of this Court's jurisdiction must begin with the Tucker Act which is codified at 28 U.S.C. §§ 1346 and 1491. The Tucker Act creates no substantive right of recovery; rather it waives sovereign immunity and defines the limits of federal jurisdiction in actions against the United States for non-tort money damages. *See United States v. Testan,* 424 U.S. 392, 400, 96 S. Ct.

> brought at the time it was filed or noticed, and the action . . . shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631.

[9] Because the Court concludes that it does not have jurisdiction over Count I pursuant to the Tucker Act, defendants' contention that the Court lacks jurisdiction over plaintiffs' overtime claims which, when they arose, were subject to negotiated grievance procedures set forth in the collective bargaining agreement need not be addressed.

948, 954 (1976); *Chabal v. Reagan*, 822 F.2d 349, 353 (3d Cir. 1987). Section 1346, referred to as the Little Tucker Act, states in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States [Court of Federal Claims], of: . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

28 U.S.C. § 1346(a). Section 1491, referred to as the Big Tucker Act, states in relevant part:

> The United States [Court of Federal Claims] shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1).

Plaintiffs' FLSA claims in Count I are for non-tort money damages against the United States and, therefore, fall within the scope of the Tucker Act. *See Parker v. King*, 935 F.2d 1174, 1178 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3055 (1992). To the extent plaintiffs' FLSA claims exceed $10,000, such claims are within the exclusive jurisdiction of the Court of Federal Claims and must be transferred to that court. *Parker*, 935 F.2d at 1178; *accord Zellous v. Broadhead Associates*, 906 F.2d 94, 96 n.3 (3d Cir. 1990). For any of plaintiffs claims that do not exceed $10,000, this Court has concurrent jurisdiction with the Court of Federal Claims under the Little Tucker Act.

Ordinarily, the Court would grant plaintiffs leave to amend their Third Amended Complaint in order to waive their right to recover in excess of $10,000 and bring their claims within the scope of the Little Tucker Act, and plaintiffs requested leave to so amend in their Opposition to Defendants' Motion to Dismiss Third Amended Complaint. However, for the reasons set forth in subsection C of this Memorandum, under the Little Tucker Act, venue is not properly laid in this district and, accordingly, leave to amend will not be granted.

B. *The Court Does Not Have an Alternative Basis for Jurisdiction Over Plaintiffs' Claims in Count I.*

In reliance upon the United States Supreme Court decision in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722 (1988), plaintiffs contend that the Court of Federal Claims does not have exclusive jurisdiction over claims against the United States which exceed $10,000. Under this line of reasoning, plaintiffs contend section 216(b) of the FLSA waives the sovereign immunity of the United States and this Court has subject matter jurisdiction pursuant to the federal question jurisdiction statute—28 U.S.C. § 1331—and 28 U.S.C. § 1337.[10]

Plaintiffs also rely on *American National Red Cross v. S.G. and A.E.*, 112 S. Ct. 2465 (1992), for the proposition that section 216(b) of the FLSA, in addition to waiving the sovereign immunity of the United States, constitutes an independent grant of subject matter juris-

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[10] 28 U.S.C. § 1331 states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337 states in relevant part:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . .

diction. The Court will address each of plaintiffs' alternative jurisdiction arguments.

1. *Bowen v. Massachusetts*

In *Bowen*, the Supreme Court stated:

> It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that Court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court.

487 U.S. 879, 108 S. Ct. at 2740 n.48. Plaintiffs maintain that in light of the language in *Bowen*, employees with FLSA claims against the United States need not rely on the Tucker Act as the basis for district court jurisdiction. The Court disagrees with this analysis.

In *Bowen*, the State of Massachusetts brought suit in the Federal District Court for the District of Massachusetts challenging a decision by the Department of Health and Human Services ("HHS") disallowing reimbursement to the state for certain expenditures under the Medicaid program and seeking declaratory and injunctive relief. In its complaint, the state relied on section 702 of the Administrative Procedure Act ("APA") as a waiver of the sovereign immunity of the United States and invoked federal question jurisdiction pursuant to 28 U.S.C. § 1331. Section 702 permits a claimant to pursue an action to review agency action in federal court where the claimant seeks other than money damages. *See* 5 U.S.C. § 702 (1988). The district court reversed the agency's decision and the Court of Appeals for the First Circuit affirmed.

The Secretary of HHS argued in the Supreme Court that section 702 did not authorize review by the district

court because the relief sought by the state was in the form of money damages. The Supreme Court disagreed, holding that although the order of the district court reversing the agency's disallowance decision could require the payment of money by the federal goverment, such an award was for specific relief rather than for money damages and thus was within the jurisdiction of the district court under the waiver of sovereign immunity contained in section 702 of the APA. 108 S. Ct. at 2740. The Court distinguished between actions at law for money damages—"which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation"—and equitable actions for specific relief—which attempt to give the plaintiff the very thing to which he was entitled. 108 S. Ct. 2731-32.

Plaintiffs' reliance on *Bowen* is somewhat misplaced as *Bowen* is distinguishable from the case presently before the Court. First, because the *Bowen* Court concluded that the relief sought by plaintiffs was specific relief, not money damages, the Tucker Act was not implicated. Second, although plaintiffs' claims for overtime bear some of the indicia of specific relief, the Court need not decide whether such claims are for specific relief,[11] as plaintiffs claims for liquidated damages clearly fall outside of the definition of specific relief articulated by the Supreme Court in *Bowen*. Claims for liquidated damages under the FLSA have been characterized by the Third Circuit as compensatory damages; "they compen-

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[11] The Court notes, without deciding the issue, that some courts have considered FLSA claims for overtime to be synonymous with back pay claims. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988); *Doyle v. United States*, 20 Cl. Ct. 495 (1990), *aff'd*, 931 F.2d 1546 (1991), *cert. denied*, 112 S. Ct. 866 (1992); *Brock v. G & W Drive-In*, 1986 WL 15410 (W.D. Ark. 1986); *Cook v. United States*, 109 F.R.D. 81 (E.D.N.Y. 1985). Back pay has been characterized as money damages. *Hubbard v. Environmental Protection Agency*, 982 F.2d 531, 536 (D.C. Cir. 1992) (citation omitted).

sate employees for the losses they may have suffered by reason of not receiving their proper wages at the time they were due." *See Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991) (*citing Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-84, 62 S. Ct. 1216, 1223 (1942); *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1473 (1992). So characterized, plaintiffs claims for liquidated damages—compensatory damages and, therefore, money damages as defined by the Supreme Court in *Bowen*—render *Bowen* inapplicable.

Jurisdiction over claims for *money damages* against the United States, such as plaintiffs claims for liquidated damages under the FLSA, is governed by the Tucker Act. Where such claims exceed $10,000, the Court of Federal Claims has exclusive jurisdiction. *Zellous*, 906 F.2d at 96 n.3. Where such claims are less than $10,000 the district court has concurrent jurisdiction with the Court of Federal Claims. *See* 28 U.S.C. 1346(a).

Finally, with respect to plaintiffs' contention that the FLSA is a waiver of sovereign immunity and that general jurisdiction statutes such as 28 U.S.C. §§ 1331 and 1337 establish that federal district courts are courts of "competent jurisdiction" within the meaning of the FLSA, the Court disagrees.[12]

Contrary to plaintiffs' position, the legislative history of the FLSA demonstrates that Congress did not intend the FLSA to waive the sovereign immunity of the United States. Section 216(b) of the FLSA, as originally enacted, was enforceable against employers generally, but did not cover federal employees or address waiver of sovereign immunity.[13] Section 203 was amended in 1974

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[12] *See supra* note 3 for the text of section 216(b) of the FLSA.

[13] Prior to the 1974 amendments, the relevant portion of section 216(b) read as follows: "Action to recover such liability may be

to expand the definition of employer to include a "public agency." *See* 1974 U.S.C.C.A.N. 2811. Section 216(b) was also amended in 1974 to extend coverage under the act to federal, state and local public employees. *Id.* As amended, the relevant portion of section 216(b) reads as follows: "An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." The 1974 amendment to the FLSA did not address sovereign immunity.

The cases relied upon by plaintiffs in their Opposition to Defendants' Motion to Dismiss Third Amended Complaint are inapposite. *See C.H. Sanders Co. v. BHAP Housing Development Fund Co.*, 903 F.2d 114 (2d Cir. 1990); *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980); *Bor-Son Building Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978); *Trans-Bay Engineers and Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976). In those cases, the statutes relied upon as the waiver of sovereign immunity were part of the National Housing Act which expressly permitted suit against the Secretary of Housing for certain claims, not a general statute such as the FLSA to which public agencies were later added.

Plaintiffs cite no direct authority for the proposition that the FLSA waives the sovereign immunity of the United States and the Court has found only one reported case that has reached such a conclusion. *See Huddleston v. Donovan*, 524 F. Supp. 179, 181 (N.D. Ill. 1981) (section 216(b) creates a waiver of sovereign immunity but does not itself confer jurisdiction, referring instead to courts of "competent jurisdiction"). The Court chooses not to follow the *Huddleston* court's conclusion with respect to the issue of sovereign immunity.

Given the fact that, with no reference to sovereign immunity, public agencies were added to the FLSA, a

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maintained in any court of competent jurisdiction . . . ." 29 U.S.C. § 216(b) (1965).

previously existing statute which did not address sovereign immunity, and the scant authority supporting plaintiffs' position, the Court cannot conclude that the intent of Congress, in enacting and amending the FLSA, was to waive sovereign immunity. Thus, the Court holds that the waiver of sovereign immunity applicable to plaintiffs' claims is found in the Tucker Act.

2. *American National Red Cross v. S.G.*

In *Red Cross,* the Supreme Court held that the "sue and be sued" provision of the American National Red Cross charter, which specifically mentioned federal courts, conferred original jurisdiction on federal courts over all cases in which the Red Cross is a party. *Id.* at 2472; 36 U.S.C. § 2.[14] The Court explained that federal court jurisdiction is provided by such a statute "if, but only if, it specifically mentions the federal courts." Plaintiffs contend that, by analogy to the sue and be sued language of the Red Cross charter, the FLSA is an independent grant of jurisdiction. The Court concludes that the holding of *Red Cross* is not capable of the broad proposition for which it is cited by plaintiffs.

First, the Court has already concluded that the FLSA does not waive sovereign immunity and, therefore, plaintiffs must rely on the Tucker Act for such waiver. The Tucker Act, in addition to defining the scope of the United States' consent to be sued for non-tort money damages, defines the limits of federal district court jurisdiction where the United States is the defendant.

Second, in reaching its conclusion that the Red Cross charter conferred original jurisdiction upon federal courts, the Supreme Court examined the history of the Congres-

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[14] The relevant portion of the Red Cross charter states: " 'The American National Red Cross' . . . shall have . . . the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States . . . ."

sional charter under which the Red Cross was created, and its prior decisions in which the jurisdictional consequences of other Congressional charters were analyzed. 112 S. Ct. at 2468-70. In contrast, the legislative history of the FLSA, and the case law interpreting that act, do not demonstrate an intent on the part of Congress to confer original jurisdiction over FLSA actions upon federal district courts.

Third, the FLSA—a statute which confers upon covered employees the substantive right to recover overtime pay and liquidated damages from an employer (including the United States)—is distinguishable from the Congressional charter under which the Red Cross was established as a "body corporate and politic" and vested with certain powers. *See* 36 U.S.C. §§ 1, 2. Section 216(b) includes additional qualifying language which is not present in the Red Cross charter—that suit may be maintained in federal or state courts *of competent jurisdiction. See e.g. Brown v. General Services Administration,* 425 U.S. 820, 833, 96 S. Ct. 1961, 1968 (1976) (as a general rule, specific jurisdictional statutes control over general statutes); *Parker,* 935 F.2d at 1178. The "competent jurisdiction" language illustrates that the FLSA itself does not confer jurisdiction, but rather relies upon other jurisdictional statutes to define which courts are competent to entertain FLSA claims. Where the employer/defendant is the United States government, competent jurisdiction is specifically defined by Tucker Act. *Huddleston,* 524 F.2d at 181; *see also Parker,* 935 F.2d at 1178. Thus, the Court concludes that the express provisions of the Tucker Act control over the general jurisdictional statutes relied upon by plaintiffs—28 U.S.C. §§ 1331 and 1337. *Brown,* 425 U.S. at 833, 96 S. Ct. at 1968.

C. Venue Does Not Lie in This District Under the Little Tucker Act.

In order to accord plaintiffs the option of remaining in the district court where their monetary claims against the United States exceed $10,000, courts have generally permitted plaintiffs to waive their right to recover in excess of $10,000 so as to bring their claims within the scope of the Little Tucker Act. *Chabal,* 822 F.2d at 357; *Hahn v. United States,* 757 F.2d 581, 587-88 (3d Cir. 1985). In this case, such an amendment would be futile.

The venue provision applicable to claims which are governed by the Little Tucker Act states in relevant part: "[a]ny civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted *only:* . . . (2) in the judicial district *where the plaintiff resides* . . . ." 28 U.S.C. § 1402(a) (emphasis added). The weight of authority holds, and the Court agrees, that under the Little Tucker Act, venue must be satisfied for each plaintiff. *See Davila v. Weinberger,* 600 F. Supp. 599 (D.D.C. 1985); *see also Brooks v. Weinberger,* 637 F. Supp. 22, 24 (D.D.C. 1986) (venue in the district court under the Little Tucker Act was only proper with respect to individuals who reside in that district); *National Treasury Employees' Union v. Reagan,* 629 F. Supp. 762, 765 (D.D.C. 1985) (claims of non-residents dismissed under 28 U.S.C. § 1402(a) for improper venue), *aff'd,* 806 F.2d 1034 (Fed. Cir. 1986), *cert. denied,* 481 U.S. 1068 (1987).

In *Davila,* the District Court for the District of Columbia held that "the [Little] Tucker Act requires plaintiffs to litigate their claims only in the district in which they individually reside, or in the Claims Court." 600 F. Supp. at 604. The *Davila* court concluded that the history and purpose of the Little Tucker Act "embody Congress' deliberate efforts to channel certain types of cases to the [Court of Federal Claims] . . . while allowing other claims to be

heard concurrently by certain district courts." *Davila*, 600 F. Supp. at 604. The court further explained that the Little Tucker Act venue provision "was deliberately drafted to carve out a narrow exception to the jurisdiction of the Court of Claims"—to give persons with relatively small claims the option of bringing suit in the district where they and their witnesses reside.[15] *Id; see also* 1964 U.S.C.C.A.N. 3254 (in rare cases where claim for back pay exceeds $10,000, it would not be an undue hardship for claimant to bring suit in the Court of Federal Claims, *as provided in the present law*). Such provision was not intended to diminsh Court of Federal Claims jurisdiction over suits involving plaintiffs who reside in multiple judicial districts.

The propriety of venue in this district was properly raised by defendants in their Motion to Dismiss Plaintiffs' Third Amended Complaint. Accordingly, the Court will assess the venue issue on the basis of circumstances as they existed at the time such Motion to Dismiss was filed. *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990). As of that time, the six original plaintiffs, all residents of the Eastern District of Pennsylvania, had been joined by numerous opt-in plaintiffs who reside in multiple judicial districts.

Based on the foregoing discussion, the Court concludes that, because the opt-in plaintiffs reside in multiple judicial districts, the only forum in which plaintiffs can pursue their claim in a single action is the Court of Federal Claims. Accordingly, plaintiffs will not be granted leave to amend their Third Amended Complaint to limit their right to recover in excess of $10,000.

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[15] Prior to passage of the Tucker Act, claims which could be asserted against the United States were extremely limited and had to be brought in the Court of Claims, predecessor to the Court of Federal Claims. *Id.* at 604 n.3; *see also* 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3657 at 213 (1976).

Plaintiffs contend that the Little Tucker Act venue provision is inapplicable on the ground that this Court has federal question jurisdiction under one of the alternatives previously addressed and, therefore, the federal question venue provision—28 U.S.C. § 1391—is applicable, not the Little Tucker Act venue provision.[16] Because the Court has addressed and rejected plaintiffs' alternative jurisdiction argument and concluded that jurisdiction is governed by the Tucker Act, the federal question venue provision is inapplicable.

Plaintiffs rely on *Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 898-99 (3d Cir. 1978), for the proposition that, because the language of the Little Tucker Act venue provision—28 U.S.C. § 1402(a)—and the federal question venue provision—28 U.S.C. § 1391(e)—is substantially similar, such language should be interpreted in a similar manner. In *Exxon*, the Third Circuit held that, in multiple plaintiff cases under section 1391(e), venue is satisfied where at at least one plaintiff resides in the judicial district. 588 F.2d at 898. Plaintiffs argue that section 1402(a) should be interpreted in a similar manner. The Court rejects this position.

Although the *Exxon* court held that "[t]here is no requirement that all plaintiffs reside in the forum district," in so ruling, the court's major concern was to avoid an unnecessary multiplicity of litigation which would result from a ruling that venue had to be satisfied for each plaintiff. *Id.* at 898. However, *Exxon* is not directly on point whereas *Davila* and its progeny address the precise issue before the Court.

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[16] Section 1391(e) states in relevant part:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof . . . may, except as otherwise provided by law, be brought *in any judicial district in which . . . the plaintiff resides.*

28 U.S.C. § 1391(e) (emphasis added).

The history and purpose underlying section 1402(a), articulated by the *Davila* court and summarized above, warrant an interpretation which differs from section 1391(e). Moreover, the language of sections 1391(e) and 1402(a) differ in one significant respect. Section 1391(e) permits an action to be brought in *any* judicial district in which the plaintiff resides whereas section 1402(a) is more limited in that it permits an action to be brought *only* in the judicial district where the plaintiff resides. The more restrictive language of the Little Tucker Act venue provision supports this Court's interpretation of section 1402(a).

Finally, the *Davila* court analyzed *Exxon* and concluded that "[i]n light of the unique and purposeful structure of the Tucker Act" the argument that section 1402(a) should be interpreted the same as section 1391(e) was unpersuasive. 600 F. Supp. at 605. In view of the purpose of the Little Tucker Act to provide a convenient forum for adjudication of small claims, multiplicity of litigation could not have been a concern of Congress when the Little Tucker Act venue provision was enacted. Moreover, the *Davila* court pointed out the danger of forum shopping which would exist in cases involving hundreds of plaintiffs from numerous jurisdictions if only one plaintiff satisfied the section 1402(a) residence requirement. *Id.* at 604.

D. *The Court of Federal Claims is Capable of Affording Complete Relief and Count II Will Be Transferred to that Court.*

Plaintiffs' claims for declaratory and injunctive relief in Count II are based on the same facts as plaintiffs' claims for overtime pay and liquidated damages in Count I. Plaintiffs contend that federal district court is the only forum which is competent to adjudicate the claims set forth in Count II of their Third Amended Complaint be-

cause the Court of Federal Claims does not have the power to declare the OPM regulation invalid.

As a threshold matter, the Court concludes that plaintiffs have standing to challenge the OPM regulation under which they were classified as administrative employees. Count II of plaintiffs' Third Amended Complaint states a case or controversy, and plaintiffs allege actual injury as a result of defendants' reliance upon and interpretation of the OPM regulation. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Moreover, Count II states a claim upon which relief may be granted—improper classification of plaintiffs as administrative employees under the OPM regulation in violation of the FLSA.

Where a claim for money damages against the United States, which is governed by the Tucker Act, is joined with a claim for injunctive or declaratory relief, the test for determining whether the district court can assume jurisdiction over the equitable claim is whether "the declaratory relief a claimant seeks has significant prospective effect or considerable value apart from merely determining monetary liability of the government." *Hahn v. United States*, 757 F.2d 581, 590 (3d Cir. 1985); *accord Matthews v. United States*, 810 F.2d 109, 111 (6th Cir. 1987); *Minnesota v. Heckler*, 718 F.2d 852, 858 (8th Cir. 1983). If the requested equitable relief has such significant prospective effect or considerable value that it, not the compensatory money payments, is the primary relief sought, the district court has jurisdiction over the equitable claim. *Heckler*, 718 F.2d at 859. However, the test articulated in *Hahn* is not intended to derogate from the Court of Federal Claims' sphere of exclusive jurisdiction. 757 F.2d at 590. If the equitable relief does not have such significant prospective effect or considerable value, and the Court of Federal Claims is capable of

affording complete relief, the district court should not permit plaintiffs to avoid bringing their entire action in that court by artful pleading. *Id.*

Although the relief sought in Count II could have some prospective effect or value apart from determining monetary liability of the United States, on the record before the Court, it cannot be said that such prospective effect or value is either significant or considerable. Plaintiffs' equitable claims are not on the level of magnitude of the constitutional claims which were at issue in *Hahn*. *See* 757 F.2d 581. Moreover, the equitable relief sought by plaintiffs in Count II is inextricably intertwined with their claims for overtime pay and liquidated damages in Count I. Finally, plaintiffs' claims for overtime pay and liquidated damages in Count I is the primary relief requested, not the equitable relief sought in Count II. *Heckler,* 718 F.2d at 859.

Plaintiffs are correct that, generally, the Court of Federal Claims does not have the authority to grant prospective equitable relief. *Bowen,* 487 U.S. 879, 108 S. Ct. at 2737 (1988); *Richardson v. Morris,* 409 U.S. 464, 465, 93 S. Ct. 629 (1973). However, the Big Tucker Act was amended in 1972 to give the Court of Federal Claims the authority to grant equitable relief. *See* 28 U.S.C. 1491(a)(2). The Court of Federal Claims' equitable powers are defined as follows:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, . . . and such orders may be issued to any appropriate official of the United States.

29 U.S.C. § 1491(a)(2). Although the equitable powers of the Court of Federal Claims are limited, it is capable of affording complete relief in this case.

The Court of Federal Claims is capable of determining whether, as defendants contend, some of plaintiffs overtime claims were subject to negotiated grievance procedures set forth in the collective bargaining agreement between the parties and, if so, whether plaintiffs must pursue such procedures in lieu of their action in court. *See generally Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.), *cert. denied*, 111 S. Ct. 46 (1990) (Pursuant to the Civil Service Reform Act, where federal employees are covered by a collective bargaining agreement under which overtime claims are subject to negotiated grievance procedures, the grievance procedures are the exclusive mechanism for resolution of such claims).

The Court of Federal Claims is also capable of determining whether plaintiffs have been properly classified as administrative employees under the FLSA, even if such a determination requires a ruling on the relationship between the OPM and DOL regulations promulgated under the FLSA and a finding that it was inappropriate for the Customs Service to rely on the OPM regulation which plaintiffs contend is more broad than DOL regulations. If the Court of Federal Claims determines that plaintiffs have been improperly classified, that court can order the Customs Service to restore plaintiffs to their appropriate duty status and award plaintiffs any overtime pay which is due and, if warranted, liquidated damages. 28 U.S.C. § 1491(a)(2).

The course adopted by the Court promotes the interest of judicial economy and efficiency by having the entire case adjudicated in one forum. That is preferable where, as here, the Court of Federal Claims can provide complete relief to plaintiffs.

III. CONCLUSION

Having determined that this Court lacks jurisdiction over Count I and, with respect to Count II, having concluded that the Court of Federal Claims is capable of affording complete relief, the Court will transfer Counts I and II of Plaintiffs' Third Amended Complaint to the Court of Federal Claims.

An appropriate order will follow.

[Filed Aug. 4, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-5629

FRANK SARACO, HOWARD MARDER,
GARY LEVENSON, CHARLES DUBANO,
RICHARD BOLES, and STEVEN FOREMAN, *et al.*,
Plaintiffs

v.

CAROL BOYD HALLETT, *et al.*,
Defendants

ORDER

AND NOW, to wit, this 3rd day of August, 1993, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint (Document No. 47), Defendants' Supplemental Memorandum In Support of Motion to Dismiss Plaintiffs' Third Amended Complaint (Document No. 48), Plaintiffs' Opposition to Defendants' Motion to Dismiss Third Amended Complaint (Document No. 49), Defendants' Second Supplemental Memorandum In Support of Motion to Dismiss Plaintiffs Third Amended Complaint (Document No. 51), Plaintiffs' Response to Defendants' Second Supplemental Memorandum In Support of Motion to Dismiss Plaintiffs' Third Amended Complaint (Document No. 52), Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the United States Court of Federal Claims, In the Alternative to Dismissal (Document No. 57), and Plaintiffs' Memorandum In Opposition to

Defendants' Motion to Transfer (Document No. 60), after a hearing on the Motion to Dismiss Plaintiffs' Third Amended Complaint on December 29, 1992, and for the reasons set forth in the Memorandum accompanying this Order, IT IS ORDERED that Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint is DENIED and Defendants' Motion to Transfer Count I of Plaintiffs' Third Amended Complaint to the United States Court of Federal Claims, In the Alternative to Dismissal, is GRANTED.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 1631, and for the reasons set forth in the Memorandum accompanying this Order, Count II of Plaintiffs' Third Amended Complaint is transferred to the United States Court of Federal Claims.

BY THE COURT:

/s/ Jan E. DuBois, J.
JAN E. DUBOIS, J.

[Entered 8/5/93]

APPENDIX E

[Filed Sep. 10, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-5629

FRANK SARACO, HOWARD MARDER,
GARY LEVENSON, CHARLES DUBANO,
RICHARD BOLES, and STEVEN FOREMAN, *et al.*,
Plaintiffs

v.

CAROL BOYD HALLETT, *et al.*,
Defendants

ORDER

AND NOW, to wit, this 10th day of September, 1993, upon consideration of Plaintiffs' Motion for Reconsideration (Document No. 62), Defendants' Response to Plaintiffs' Motion for Reconsideration (Document No. 64), and Plaintiffs' Reply to Defendants' Response (Document No. 65), IT IS ORDERED that Plaintiffs' Motion for Reconsideration is DENIED.

The Court's ruling is based on the following:

1. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). Such motions are not for the purpose of rehashing arguments and facts previously presented. *Keyes v. National Railroad Passenger Corp.*, 766 F. Supp. 277, 280. (E.D. Pa. 1991).

2. In their Motion, although plaintiffs assert their disagreement with the Court's legal interpretations and conclusions, they essentially restate arguments previously raised in their papers submitted in opposition to defendants' Motion to Dismiss and Motion to Transfer, but do not demonstrate any manifest errors of law or fact.

3. In the Motion for Reconsideration plaintiffs cite *Cosme Nieves v. Deshler*, 786 F.2d 445, 447-450 (1st Cir. 1986), as authority for the proposition that the Fair Labor Standards Act ("FLSA") waived the sovereign immunity of the United States. The *Nieves* Court did not so hold. The Court held only that, under the FLSA, the United States has waived the sovereign immunity of non-appropriated fund instrumentalities ("NAFI'S") to suits by its employees to the extent of its non-appropriated funds. 786 F.2d at 449. Therefore, the court's statement that the FLSA waives the sovereign immunity of the United States and federal agencies is dictum.

The *Cosme Nieves* court construed the case as "a[n] FLSA action against a NAFI itself and its non-appropriated funds," 786 F.2d at 448, not an action against the United States. As the case was not considered a suit against the United States, the Tucker Act was not applicable.

Furthermore, in reaching its holding, the *Cosme Nieves* court distinguished NAFI's, revenue producing entities which are not supported with funds from the general treasury, from typical federal agencies which are supported by funds from the general treasury. 786 F.2d at 448-49. Based on that distinction, the court concluded the United States Court of Federal Claims did not have jurisdiction over NAFI's as that court may only render judgments payable from appropriated funds.

4. The Court considered and rejected plaintiffs' argument that the FLSA waives the sovereign immunity of the United States and concluded that the Tucker Act

provided the applicable waiver of sovereign immunity. Mem. at 15-16.

5. Plaintiffs have not set forth in their Motion any law or facts which warrant reconsideration of this Court's Memorandum and Order of August 3, 1993.

BY THE COURT:

/s/ Jan E. DuBois, J.
JAN E. DUBOIS, J.

[Entered 9/13/93]

APPENDIX F

Individuals Who Filed Consent Forms To Become Parties Plaintiff

Ralph D. Acuna
Louis J. Adams
Manuel C. Alvarez
Robert R. Anderson
Ruben Antonetti
Paul R. Anuschat
Juan L. Arroyo
Peter M. Arroyo
Norma C. Ayuso
David C. Bailey
Jose M. Barela
Paul R. Barra
Jack C. Beddingfield
Frank S. Belle
Geraldine Bernard
Barbara L. Bozek
Thomas P. Brady
Weldon C. Brechtel
Linda Bruno
James J. Bruton
Robert J. Butler
Anthony M. Caccavale
Domenico A. Calise
James G. Callahan
Gary M. Capko
Bernard Caplan
Hampton P. Carter
Leo Castro
M. Loretta Cofield
Frances A. Cullier
Marie A. Cosme-Rittenberg
Florencio Cruz
Evelyn Cruz Del Toro
Craig S. Cummings
Benjamin De Jusus
Billy G. Denby
Douglas J. Dloughy
Joe C. Dominguez
Dennis R. Donovan
William A. Donovan
Thomas P. Dorney
Robert N. Dorsch
William W. Elegante
Leopoldo Elizondo
Henry M. Enriquez
William E. Erbe
Linda S. Erickson
John G. Farrell
Milagros Figueroa-Rivera
Eugene E. Fischer-Callejo
Margaret A. Fitzgerald
Lawrence G. Frank
Diane Gainer
Rocky J. Galarza
Hilda E. Garcia
Paul Garretto
Jan E. Garzon
Gary A. Geoffrion
Jesus Gomez
Jose A. Gonzalez
Miguel I. Gonzalez
Adrian Gordon
Reta F. Grant
Olga Grijalva
Patricia A. Gunderson
Norma E. Hanna
Richard J. Haphey
Thomas Haugan

Francis Hernandez
Jose J. Hernandez
Ruel P. Holden
Teresa A. Honan
Kenneth Hooper
Odessa E. Jacocks
Emily Kershules
John W. Kershules
Kenneth L. King
Alfred C. Komorowski
George B. Kowal
Arthur G. Kretchman
Andrew L. Kulp
Jerry Kuperstein
Robert C. Kuster
Jerome K. J. Lai
Evon M. D. Lawson
Augustin A. Leyva
Alfred T. Lopez
Olga I. Lopez-Rivera
Lavonya Macon
Mary K. Magnusson
Edward L. Maher
Sonia Maldonado
Ronal L. Mann
Albert Marcantonio
Molses Marreno-Rivera
Brain G. Martin
Flusa Martinez-Felipe
Salvatore P. Mastropolo
Edward M. Mazique
Donald F. McGettigan
Ernesto T. Medina
Sandra J. Medlock
Carmen C. Mercado
Robert Meyer, II
Noreene B. Morris
Robert D. Mulholland
Joseph Natale
Carmen Nazario-Rivera
Vincent R. O'Campo
Hector A. O'Leal
John R. Oravec
Alfonso J. Orosz
Allen W. Ostrander
John C. Owens
Mary Ann Papernik
Andre C. Pena
Vincent S. Pete
Dagoberto Pinol
John A. Pollard
Leah H. Quatey
William R. Raftery
Edwin Ramos
Nancy R. Rescigno
Bayardo M. Rex
George W. Riggs
Bienvenido Rodriguez
Nick A. Romeo
Grennaro A. Ruggiero
Gregorio G. Salinas
Arturo B. Sanchez
Paula D. Sarlls
Ann E. Scanlan
John F. Schaffer
Erling R. Scheldrup
Raymond M. Scruggs
Lillie M. Sears
Charles R. Sheller
Daniel G. Sherlock
Victoria Silex-Martinez
Olga Silva
Juan J. Sisco
Enrique Solorzano
Kristine G. Sowa
Gerald R. Stachowitz

Walter B. Stevens
Hector D. Suarez-Lopez
Charles W. Supik
Marilyn A. Swayze
Larry P. Tanacredi
Andrew L. Taylor
Cynthia Tedesco-Dimino
Reynaldo te Jada, Jr.
William L. Thurston
Darrell G. Toth
Lee C. Tucker
Frank J. Tufano
Roy E. Urban
Pedro M. Vasquez
Jerry Vicinanza
Hector Vidalez
Ramon Villarin
Marjorie Wainwright
Robert E. Washington
Philip S. G. Watkins
Frederick L. Welborne
William P. Westman
Jeannette Wilson
William J. Winter, Jr.
Charla C. Wong
Carlton A. Yackel
John V. Zeigler
Robert Alvarado
Annette Artis
Aurelio Arzola, Jr.
Patricia Aveitia
Dale C. Brown, Sr.
Sharon A. Brown
Juan J. Castillo
Karl L. Crowe
Emile I. Davis, Jr.
Jeffery R. Davis
Alfred S. Douglas
Donnie M. Eames
Paul T. Ferrer
Isabel Flores, Jr.
George Garcia, Jr.
Richard H. Gattis
Luis A. Gonzalez
Judy L. Goodman
Gary C. Hallonen
Beverly J. Hewitt
Lawrence E. Hilgert
Abraham Irizarry
Robert W. Juszkiewicz
Gloria A. Lambert
John R. Lawless
Alejandro Luna
Donald L. Lynch
Annie R. Meade
Leonard A. Michaud
Michael L. Miller
John F. Mulvihill
Don K. Nelson
Virginia E. Nelson
Oraldo H. Olivas
Bernard A. O'Sullivan
Frank Otero, Jr.
Laurie Paul
Yvonne Powell
Leo W. Quilichini
Ralph E. Quick
Dorothy J. Riley
Reinaldo Rivera-Cruz
George J. Romero
Calvert K. Romney
Manuel Rosario-Molina
Jack J. Russo
Darlene Scarpino
David M. Seeley
Joseph Sharpe

Roger C. Staubs
Gerald A. Tremblay
Benjamin J. Villarreal
Deborah Walsh
Kay Whalen
Frances Allday
Jay Baltuch
Consuelo Barrera
James W. Bean
Moor Braun
Barbara Chambless
Linda Sue Finnerty
Roslyn Haynes
Barbara G. Jarmon
Paul N. Jones
Greg M. Johnson
Frank J. Mudey
Robert E. O'Connor
Kevin Priest
Deborah Robinson
Marva D. Thomas
Luis R. Vassallo
Betty M. Chambers
Charles M. Hawkins
Terri L. Padgett
Carlos A. Aguino
Raul W. Arruyo
Carlos Baco
Hector Caban Santiago
Jose E. Cajigas
Joseph W. Campbell
Crawford W. McAllister
Carmen C. Mercado
Oscar S. Miura
Carlos J. Ortiz
Rosa E. Perez
Gilberto Perez-Otero
Dagoberto Pinol
Rivera-Melendez Cesar L.
Jose A. Rodriguez
Hector D. Suarez Lopez
Felix A. Ramos
Santiago Samuel
Deborah J. Wintjen
Lawrence R. Abramson
John A. Agbayani
Gene B. Agustin
Bonnie Aidelman
Andrew S. Aldana
Oneeta M. Alexander
Alonzo Allen, Jr.
Paul Altiero, Jr.
Avelino Amaya
Susan Amundsen
Vicki D. Anderson
Jane B. Andreachi
Sandra V. Androvich
Melvin J.K. Apo
Stephen H. Appleyard
Roy E. Armstrong
Deborah J. Arrington
Annette Artis
John W. Ashman
Georgia E. Austin
Mark S. Axtman
Scott M. Baran
Geoffrey H. Barrett
Thomas D. Batha
Carolyn B. Baxley
Jeremy E. Baxter
Victoria M. Baxter
Carolyn M. Beaulieu
Paul Beckage, II
Gloria J. Becker
Charlotte J. Belden
William S. Bell
Doreatha Benn

Lawrence C. Bennett
Donald M. Benton
David Berkofsky
Lester S. Bevil
Judy Bidwell
Linda L. Birmingham
Sandra G. Black
Ricardo F. Blancas
Scott M. Bober
Ricardo F. Bowen
Don W. Bolding
Martin L. Bond
Dennis L. Boorsma
Robert W. Borkowski
George Bredsten
John F. Brooks
John J. Brothers
Alfred W. Brown
Gordon A. Brown
Henry Brown
Rodney Brown
Guido M. Brunetti
Joyce E. Bryant
Sharron L. Bryant
John E. Bundy
Domenick J. Buonocore
Noel T. Burke
Susan L. Buruca
Robert J. Caffrey
Helena V. Caldwell
Robert G. Caldwell
John H. Callaway
Patrick V. Caputo
John A. Carman
Juan M. Casas
Wallace F. Cash, Jr.
William Cash
Donald R. Cates
Richard W. Caudill
William M. Celentano
Gino R. Cerreta
Arturo Chacon
Mary L. Chantiny
William J. Chula
Louis R. Cirotti
Donna L. Ciryak
Robert D. Clark
Thomas J. Clarke
Franklin P. Clayton
Joan M. Cobb
Michael A. Colon
Donald J. Conroy
Robert S. Contrada
Kathleen M. Conway
James D. Cooper
Abraham Cordero
Charles L. Corn
Antolina Cotto
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Librado Cruz
Rafael F. Cuevas
Patrick J. Cullinane
Edward F. Curley
James J. Curtin
Charles P. Cutter
Eugene A. Daly
Weston S. Daniel
Sandra L. Darrall
Dolores Daversa
Lonnie J. Davey
Raymundo Davilla
David I. Dawley
John R. Day
Michael C. Day
Gwendolyn A. Debose
Darryl Delaune
Collette T. Dennehy
Laura Denny

Robert J. Dering
Donald A. Deturck
John M. Devine
Tommie L. Dillard
Harry M. Dittmyre
Dennis J. Doherty
Charles F. Dolan
Louis J. Dominico, Jr.
Jonathan J. Donaghy
Albert J. D'Onofrio
Mark R. Dougherty
James J. Duffy
Maribeth Dunajski
John E. Duncan
Bernard G. Durnan
Jerome H. Dziura
Terry L. Estell
Jose A. Estrada
Victor C. Fagerroos
Alberto J. Farias
Alan B. Feingold
Michael J. Felger
Yvonne M. Fellegara
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APPENDIX G

STATUTORY PROVISIONS

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

29 U.S.C. 216

* * * *

(b) Any employer who violates the provisions of section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Supreme Court, U.S.
FILED
MAR 27 1996

(2)

No. 95-1193

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANK SARACO ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, is the only source of jurisdiction to entertain Fair Labor Standards Act overtime claims against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 61 F.3d 863. The opinion of the district court (Pet. App. 11a-35a) is reported at 831 F. Supp. 1154.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1995. A petition for rehearing was denied on September 22, 1995. Pet. App. 9a-10a. The Chief Justice extended the time to file a petition for a writ of certiorari to January 11, 1996, and then to January 25, 1996. The petition for a writ of certiorari was filed on January 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are six employees of the United States Customs Service (Customs), purporting to sue on behalf of themselves and approximately 800 other individuals who are or have been employed by Customs, either as customs inspectors or as field national import specialists. Petitioners filed a complaint in the United States District Court for the Eastern District of Pennsylvania, raising two claims. In Count I, they alleged that the government had failed to pay them overtime pay at the rate required by the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* They sought a money judgment, in an unspecified amount, for the unpaid overtime to which they claimed they were entitled, plus liquidated damages, pursuant to 29 U.S.C. 216(b). In Count II, petitioners challenged regulations issued by the Office of Personnel Management (OPM) governing the application to federal employees of the "administrative" exemption from the FLSA overtime provisions, 29 U.S.C. 213(a)(1),[1] to the extent that those regulations define

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[1] Section 213(a)(1) provides, in pertinent part: "The provisions of section[ ] * * * 207 [the overtime provisions] of this title shall not apply with respect to—(1) any employee em-

the exemptions more broadly than do the regulations of the Department of Labor (DOL) concerning non-federal employees.[2]

The government moved to dismiss, or, in the alternative, to transfer Count I to the Court of Federal Claims (CFC) pursuant to 28 U.S.C. 1631. One of the grounds for dismissal, and the ground for the alternative relief of a transfer to the CFC, was that the only source of jurisdiction to entertain FLSA overtime claims against the government is the Tucker Act, and that, because the plaintiffs neither alleged that their claims did not exceed $10,000 nor waived their right to recover more than $10,000, Count I was not within the jurisdiction conferred upon the district court by the Little Tucker Act, 28 U.S.C. 1346(a). The district court agreed. Pet. App. 17a-25a. In addition, the district court concluded that the limited equitable powers conferred upon the CFC by 28 U.S.C. 1491(a)(2) are sufficient to enable the CFC to afford complete relief in this case. Pet. App. 29a-32a. Accordingly, the district court transferred the entire case to the CFC, without reaching other possible grounds for dismissal. *Id.* at 33a.

2. Petitioners appealed the transfer order to the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. 1292(d)(4)(A). Petitioners challenged the district court's conclusion that it lacked jurisdiction to entertain Count I, but they did not dispute that, if it was correct to transfer Count I, it was correct to transfer Count II as well.

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ployed in a bona fide executive, administrative, or professional capacity * * *."

[2] The Director of OPM is authorized to administer the FLSA with respect to federal employees. See 29 U.S.C. 204(f).

The court of appeals affirmed. Pet. App. 1a-7a. It observed that the district court's jurisdictional holding was compelled by binding Federal Circuit precedent and was not in conflict with decisions of any other circuit. The court of appeals acknowledged that there was a "[d]ivergence of judicial opinion concerning the jurisdiction of monetary claims against the government under various statutes," *id.* at 7a, but noted that there was no such divergence with respect to overtime claims under the FLSA. The court stated:

> [T]he Federal Circuit in *Zumerling v. Devine* [, 769 F.2d 745 (Fed. Cir. 1985),] held that jurisdiction of cases under the FLSA was provided only by the Tucker Act. *Zumerling* states the consistent law of the Federal Circuit. We have come upon no instances of circuit conflict in FLSA actions against the United States. *Zumerling* is in accord with [*United States v.*] *Testan*[, 424 U.S. 392 (1976)] and [*United States v.*] *Mitchell*, [463 U.S. 206 (1983)], and is not inconsistent with *Bowen v. Massachusetts* [487 U.S. 879 (1988)] * * *. It is binding precedent in this court. The district court correctly applied this precedent in transferring the case to the Court of Federal Claims.

Ibid.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. The Federal Circuit correctly held that the only source of jurisdiction to entertain FLSA overtime

claims against the United States is the Tucker Act. Petitioners argue that this ruling is inconsistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). As the court below observed, however, *Bowen* is quite different from this case. Pet. App. 6a.[3]

Bowen was not a suit for pay or damages, but rather was a suit by a State seeking judicial review pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 702, of a decision of the Secretary of Health and Human Services (HHS) disallowing certain state expenditures for purposes of federal reimbursement pursuant to the Medicaid Act, 42 U.S.C. 1396 *et seq.* The Court held that, although the relief sought might result in the payment of money by HHS to the State, the relief did not constitute "money damages" within the meaning of 5 U.S.C. 702. 487 U.S. at 909-910. The Court stressed that the State's suit was "not a suit seeking money in *compensation* for the damage sustained by the failure of the federal government to pay as mandated * * * ." 487 U.S. at 900 (emphasis in original).

This case, however, *is* such a suit. Petitioners' overtime claims are brought pursuant to 29 U.S.C. 216(b), which provides: "Any employer who *violates* the [maximum hours] provisions of * * * section 207 of this title shall be liable to the employee or employees affected *in the amount of their* * * * *unpaid overtime compensation* * * *, and in an

---

[3] The Eleventh Circuit has reached the same conclusion, stating: "[W]e conclude that *Bowen* does not overturn previous authority establishing the Tucker Act as the exclusive jurisdictional basis for FLSA claims against the government." *Parker* v. *King*, 935 F.2d 1174, 1177 (11th Cir. 1991), cert. denied, 505 U.S. 1229 (1992).

additional equal amount as *liquidated damages*" (emphasis added). The remedy described in Section 216(b) is not merely specific relief that happens to be monetary; it is money *damages*. See *Hubbard* v. *Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc) (back pay claim treated as claim for money damages under *Bowen* analysis). And, as the district court observed, even if petitioners' overtime claims "bear some of the indicia of specific relief, * * * [their] claims for liquidated damages clearly fall outside of the definition of specific relief articulated by the Supreme Court in *Bowen*." Pet. App. 21a.[4]

Petitioners place great stress upon the Court's observation, made in a footnote in *Bowen*, that Tucker Act jurisdiction "is 'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910 n.48. Petitioners' invocation of that observation in this case involves a false analogy between the APA and the FLSA. In *Bowen*, there was no question that suits against the United States for judicial review pursuant to the APA are generally maintainable in the district courts. The question was whether suits involving monetary relief fell within an exception to that general rule, *i.e.*, whether the Claims Court's Tucker Act jurisdiction was so exclusive as to limit

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[4] The availability to petitioners of an adequate remedy in the CFC further distinguishes this case from *Bowen*, regardless of whether the relief they seek is characterized as specific relief or damages. As the Court noted in *Bowen*, "suits under the Tucker Act in the Claims Court offer precisely the sort of 'special and adequate review procedures' that [5 U.S.C.] § 704 requires to direct litigation away from the district courts." 487 U.S. at 900-901 n.31.

jurisdiction that Congress had otherwise granted the district courts. Petitioners' argument here proceeds as if there were likewise no question that suits against the United States under the FLSA are maintainable in the district courts. That, however, is the very question presented in this case.

Both the district court and the court of appeals concluded that Congress did not grant any court authority, independent of the Tucker Act, to entertain suits against the United States for overtime pay and liquidated damages under the FLSA. Although the FLSA provides that "[a]n action to recover [overtime pay and liquidated damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. 216(b), the FLSA does not state *which* court is "of competent jurisdiction" when the employer is the United States. As the Federal Circuit explained in *Zumerling* v. *Devine*, 769 F.2d 745 (Fed. Cir. 1985) (the case upon which the court below relied as controlling), "the words 'of competent jurisdiction' tell us that the words do not stand alone but require one to look elsewhere to find out what court, if any, has jurisdiction." *Id.* at 749. The Federal Circuit concluded in *Zumerling*, and reiterated in this case, that it is to the Tucker Act that a court must look to find out what court possesses jurisdiction. Nothing in *Bowen* conflicts with that conclusion.

2. Petitioners also argue that the decision of the Federal Circuit in this case is in conflict with *Ward* v. *Brown*, 22 F.3d 516 (2d Cir. 1994). If *Ward* conflicts with any Federal Circuit decision, it is *Mitchell* v. *United States*, 930 F.2d 893 (Fed. Cir. 1991), not this case.

Neither *Ward* nor *Mitchell* involved the FLSA. Both were APA suits challenging adverse personnel actions, with ancillary monetary relief sought in the form of back pay. In *Mitchell*, the Federal Circuit held that a service member's suit for reinstatement and back pay could not be brought in district court pursuant to 28 U.S.C. 1331 and the APA. The court rejected the service member's reliance upon *Bowen*, observing that "[i]n *Bowen*, the Supreme Court itself distinguished the Claims Court's jurisdiction over back pay cases from jurisdiction over the Medicaid disallowance case." *Mitchell*, 930 F.2d at 896. In *Ward*, the Second Circuit held that the plaintiff could sue in district court under the APA to challenge a Department of Veterans Affairs decision removing her from her position as a nurse. As to the monetary relief, the court agreed that back pay was not available under the APA, but nonetheless held that plaintiff could seek back pay in the district court pursuant to the Back Pay Act, 5 U.S.C. 5596.

Mitchell and *Ward* involve the question whether APA challenges to removal actions are within the district courts' federal question jurisdiction even when the relief sought includes an ancillary claim for back pay, or whether all claims for back pay must be brought in a court possessing Tucker Act jurisdiction. That question, however, is not involved here. The monetary relief petitioners seek is not ancillary to an APA claim or to any other claim that would normally fall within the district court's jurisdiction. Here, the underlying cause of action is for an alleged monetary loss.[5] Jurisdiction to entertain claims of

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[5] Count II of the complaint in this case asserts an APA claim, but it is ancillary to the monetary claim asserted in

that kind is normally based upon the Tucker Act. The Second Circuit did not hold in *Ward* that alternative sources of jurisdiction are available for such claims. The holding of the court below that the Tucker Act is the exclusive source of jurisdiction for FLSA overtime claims therefore is not in conflict with the holding in *Ward*.

3. Petitioners erroneously attribute to the court below an acknowledgement that "its ruling also conflicts with a number of decisions (both before and after *Bowen*) that have found an independent basis for district court jurisdiction in 28 U.S.C. 1331 where a statute allows suit against the federal government 'in any court of competent jurisdiction.'" Pet. 8. The court of appeals did not acknowledge any such conflict, and no such conflict exists. The court of appeals noted that there is a "[d]ivergence of judicial opinion concerning the jurisdiction of monetary claims against the government *under various statutes*," Pet. App. 7a (emphasis added), but that it had "come upon no instances of circuit conflict in FLSA actions against the United States." *Ibid.*

Count I, rather than vice versa. Indeed, Count II challenges the validity of the OPM regulations in question only *to the extent* that they define the administrative exemption more broadly than do the DOL regulations concerning non-federal employees. Petitioners do not allege that the OPM regulations in fact do so. Moreover, this suit was brought on behalf of present and former customs inspectors and field national import specialists. Former occupants of those positions may seek retrospective monetary relief under Count I, but they lack standing to seek the prospective relief requested in Count II. Nor does it appear that Count II was meant to be brought on behalf of former Customs employees. For former employees, this case is exclusively a suit for monetary compensation, with no APA component at all.

Petitioners likewise cite no FLSA cases conflicting with the court of appeals' decision in this case. Petitioners do cite a number of cases finding 28 U.S.C. 1331 to be a source of jurisdiction of actions based upon a statute allowing suit against a federal governmental entity "in any court of competent jurisdiction," but those are cases interpreting the "sue-and-be-sued" clause in the National Housing Act, 12 U.S.C. 1702. Section 1702 provides in part that the Secretary of Housing and Urban Development may "sue and be sued in any court of competent jurisdiction, State or Federal." The language of 12 U.S.C. 1702 bears some similarity to that of 29 U.S.C. 216(b), which provides that "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction * * *." There are, however, important differences between the two statutes.

Section 1702 deals exclusively with suits by or against one federal agency and uses "sue-and-be-sued" language that has long been recognized to signal a particular type of sovereign immunity waiver. See *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988); see also *United States* v. *Nordic Village*, 503 U.S. 30, 34 (1992). Section 216(b), by contrast, deals with suits against *any* employer subject to the FLSA and does not employ the key "sue-and-be-sued" language that has been thought to waive sovereign immunity in suits against a particular federal agency. Moreover, because the federal government is only one of the types of employers addressed in Section 216(b), the reference to "court of competent jurisdiction" takes on a different meaning than it would if Section

216(b) were limited to the federal government. For private employers and state or local employers, the term "court of competent jurisdiction" in Section 216(b) includes state courts and federal district courts. In a suit against the *federal government* pursuant to Section 216(b), however, there is no reason to construe the term "court of competent jurisdiction" as extending to courts lacking Tucker Act jurisdiction, and the FLSA cannot be viewed as a waiver of sovereign immunity independent of the Tucker Act.[6] As the district court observed:

> Given the fact that, with no reference to sovereign immunity, public agencies were added to the FLSA, a previously existing statute which did not address sovereign immunity, and the scant authority supporting [petitioners'] position, the

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[6] The opinion of the court of appeals contains a statement which, if taken out of context, could be construed to state that the FLSA itself is a waiver of sovereign immunity. In that statement, the court of appeals observed that, in its earlier decision in *Zumerling*, "[t]he court explained that the FLSA conferred the right to recover money from the United States, that is, the FLSA contained the requisite waiver of sovereign immunity," Pet. App. 5a. In *Zumerling* itself, however, the court stated that the waiver of sovereign immunity for FLSA claims was contained in the *Tucker Act*. *Zumerling*, 769 F.2d at 748. As the *Zumerling* court further explained, that waiver also depends upon the FLSA, because the waiver contained in the Tucker Act applies to FLSA suits only to the extent that the FLSA confers a substantive right to receive money from the government. "*Testan* draws a distinction between the law conferring a substantive right to receive money from the United States, and a law endowing a court with jurisdiction of suits to enforce that right, and *both* must be present." *Zumerling*, 769 F.2d at 749 (emphasis added); see *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

> Court cannot conclude that the intent of Congress, in enacting and amending the FLSA, was to waive sovereign immunity. Thus, the Court holds that the waiver of sovereign immunity applicable to [FLSA] claims is found in the Tucker Act.

Pet. App. 23a-24a.

4. Petitioners raise two additional arguments that concern not the correctness of the court of appeals' decision in this case, but the desirability of the result. Those arguments cannot overcome the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists," *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). And even apart from that rule, neither of petitioners' arguments presents a sound reason for overturning the court of appeals' decision.

First, petitioners argue that the venue provisions applicable to Tucker Act suits may preclude plaintiffs residing in different districts from joining together to sue in a single forum outside of Washington, D.C., even when they bring claims that are within the district court's Tucker Act jurisdiction because they seek less than $10,000. That is so because, as the district court held in this case, Pet. App. 26a-29a, district court venue in Tucker Act cases is governed by 28 U.S.C. 1402(a), which provides that, except when the plaintiff is a corporation, actions pursuant to 28 U.S.C. 1346(a) may be prosecuted only "in the judicial district where the plaintiff resides." See *Parker* v. *King*, 935 F.2d 1174, 1176 (11th Cir. 1991), cert. denied, 505 U.S. 1229 (1993); *Brooks* v. *Weinberger*, 637 F. Supp. 22, 24 (D.D.C. 1986); *Davila* v. *Weinberger*, 600 F. Supp. 599, 602 (D.D.C. 1985).

According to petitioners, it would be undesirable to restrict the venue of FLSA cases in this manner. In applying 28 U.S.C. 1402(a) to this case, however, the district court noted the undesirable consequences of *not* restricting venue in this manner.[7] Petitioners did not appeal the district court's venue ruling, and the court of appeals did not discuss venue in its opinion. Thus, especially given the record presented in this case, the incidental venue consequences of the Federal Circuit's jurisdictional ruling are not a proper basis upon which to call that ruling into question.

Second, alluding to the fact that appellate review in Tucker Act cases is within the exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit, 28 U.S.C. 1295, petitioners argue (Pet. 12) that "the purposes of the FLSA are ill-served by centralizing the appeals process." According to petitioners, the rationale for exclusive appellate jurisdiction does not apply to FLSA cases. Because the principles to be applied in this case are similar to those applied by other courts in private-sector FLSA cases, petitioners reason, "the Federal Circuit can develop no particular ability to provide definitive answers to FLSA questions." *Ibid.*

Petitioners' premise is flawed, because the FLSA contemplates a separate system of administration in the case of federal employment. See 29 U.S.C. 204(f). Even assuming, however, that there were merit to

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[7] "[T]he *Davila* court pointed out the danger of forum shopping which would exist in cases involving hundreds of plaintiffs from numerous jurisdictions if only one plaintiff satisfied the section 1402(a) residence requirement." Pet. App. 29a.

this contention, it is beside the point. The issue here is whether the court of appeals correctly decided that the Tucker Act is the exclusive source of *trial court* jurisdiction to entertain FLSA suits against the federal government, not whether the rationale for the Federal Circuit's exclusive *appellate* jurisdiction in Tucker Act cases specifically applies in full force to FLSA suits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-1193

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANK SARACO, *et al.*, and OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioners,
v.
THE UNITED STATES and GEORGE WEISE in his capacity as COMMISSIONER, UNITED STATES CUSTOMS SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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REPLY BRIEF

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1. In *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988) this Court explained that Tucker Act jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." As we explained in our opening brief, under *Bowen*, district courts may assert jurisdiction over Fair Labor Standards Act claims against the United States, independent of the Tucker Act, pursuant to 28 U.S.C. 1331, because the FLSA provides its own waiver of sovereign immunity.

In its opposition (at pp. 5-6), the government seeks to distinguish *Bowen* on the grounds that, although the

plaintiff there sought monetary relief, it did not seek money "damages." As we noted in our petition (at 7, n.4), this distinction is beside the point. *Bowen* discussed the difference between money damages and specific relief because the Administrative Procedure Act, under which the suit in that case was brought, waived the federal government's sovereign immunity only for the latter, and not for money damages. We rely upon a different part of *Bowen* for the proposition that *even if* a plaintiff could obtain money damages under the Tucker Act, he can still have recourse to federal district court where Congress provides an independent basis for such jurisdiction. 487 U.S. at 910, n.48.

With respect to that point, the government asserts (Op. Cert. at 6) that our reliance upon that observation in *Bowen* "involves a false analogy" between the APA and the FLSA. It purports to distinguish *Bowen* on the grounds that there was "no question" that suits against the United States under the APA could be maintained in district court. *Bowen*, the government argues (*id.* at 6-7), involved the issue whether suits involving monetary relief fell within an exception to that rule—"*i.e.* whether the Claims Court's Tucker Act jurisdiction was so exclusive as to limit the jurisdiction that Congress had otherwise granted the district courts." On the other hand, the government contends (*id.* at 7), the question whether FLSA suits against the United States can be pursued in district court is the very question presented in this case.

The government's attempted distinction is meritless. Just as there was no question in *Bowen* that APA suits could be brought in district court pursuant to 28 U.S.C. 1331 because they "arise under" federal law, there is similarly no question that FLSA suits "arise under" a federal statute. Assuming, therefore, the requisite waiver of sovereign immunity, district courts possess jurisdiction over FLSA suits pursuant to 28 U.S.C. 1331, just as they do over APA actions. This Court's observa-

tion regarding the non-exclusive character of Tucker Act jurisdiction in *Bowen* is directly on point.

2. There is also no merit to the government's contention that the FLSA does not waive sovereign immunity. Op. Cert. at 10-12. By its plain language, the FLSA authorizes suit against "any employer (*including a public agency*) in any Federal or State court of competent jurisdiction." 28 U.S.C. § 216(b) (emphasis supplied). Further, pursuant to the 1974 amendments to the FLSA, the Act provides that " 'public agency' means the Government of the United States . . . . and any agency of the United States." 29 U.S.C. 203(x). The definition of an "employee" authorized to sue their employer includes "any individual employed by the Government of the United States in any executive agency." 29 U.S.C. 203(e)(2)(A)(ii). Similar language, used in sue and be sued clause provisions, has been held waive the government's immunity to suit and allow the district courts to assert jurisdiction under 28 U.S.C. 1331.[1]

Even the Federal Circuit below recognized that the FLSA contains a waiver of soverign immunity.[2] The

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[1] In response to this point, the government merely asserts that "sue and be sued" language has been recognized to confer what it calls "a particular type" of immunity waiver. Op. Cert. at 10. That assertion does not take the government far; obviously, the language of the FLSA is not identical to "sue and be sued" language. The FLSA merely subjects the government to suit; it does not authorize it to sue. The crucial point (ignored by the government) is that both the sue and be sued clauses and the FLSA subject the government to suit in "any court of competent jurisdiction." It is that language, we contend (and a number of courts of appeals have held), that allows district courts to assert jurisdiction independent of the Tucker Act, pursuant to 28 U.S.C. 1331.

[2] The Federal Circuit clearly stated below that the FLSA waives the government's immunity to suit and that it had so found in *Zumerling*. Pet. App. 5a, citing *Zumerling*, 769 F.2d at 749. The government's effort (Op. Cert. 11, n.6) to contradict the Federal Circuit's statement and that court's interpretation of its own precedent is strained and unconvincing. Thus, while it is correct

courts (other than the district court below) that have discussed the issue, have similarly plainly recognized that Congress provided the federal government's consent to suit in the FLSA.[3] The only question upon which there appears to be disagreement is whether that waiver of sovereign immunity allows the district court to assert jurisdiction pursuant to 28 U.S.C. 1331, or whether the Tucker Act precludes reliance upon other jurisdictional statutes.

The government's argument in that regard is that 29 U.S.C. 216(b) "does not state *which* court is 'of competent jurisdiction' when the employer is the United States." Op. Cert. 7. That observation, of course, is correct. It does not, however, support the conclusion the government urges—that only *one* court (a court exercising Tucker Act jurisdiction)—can serve as "a court of competent jurisdiction." The FLSA authorizes suit against the government in "*any* court of competent jurisdiction." 29 U.S.C. 216(b) (emphasis supplied). Neither the government nor the Federal Circuit has explained why "it is to the Tucker Act that a court must look to find out what court possesses jurisdiction" (Op. Cert. at 7), when, in fact, 28 U.S.C. 1331 makes the district courts tribunals of "competent jurisdiction."

Similarly unexplained is the government's bald assertion that "in a suit against the *federal government* pursuant to Section 216(b) . . . there is no reason to con-

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that in *Zumerling* the Federal Circuit observed that a waiver of the sovereign immunity of the United States "can be found in the Tucker Act" (769 F.2d at 748), *Zumerling* also recognized that the FLSA creates a right to bring an action seeking money damages against the United States. *Id.* at 749. *Zumerling* ruled that the right to bring an action for money (the waiver of sovereign immunity) must be coupled with a statute endowing the district court with jurisdiction to enforce that right. It then went on to hold (erroneously) that only the Tucker Act conferred jurisdiction.

[3] *See Cosme Nieves v. Deshler*, 786 F.2d 445, 447-50 (1st Cir. 1986), *cert. denied*, 479 U.S. 824 (1986), *Huddleston v. Donovan*, 524 F.Supp. 179, 181 (N.D. Ill.).

strue the term 'court of competent jurisdiction' as extending to courts lacking Tucker Act jurisdiction." Op. Cert. at 11 (original emphasis). In fact, as *Bowen* teaches, there is no reason *not* to construe the term to extend to courts lacking Tucker Act jurisdiction so long as those courts are otherwise tribunals of "competent jurisdiction."

3. In our opening brief, we showed that the Federal Circuit's decision conflicts with *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994), which found district court jurisdiction under 28 U.S.C. 1331 over federal employee plaintiffs' claims for backpay exceeding $10,000. In opposition, the government admits that *Ward* conflicts with another Federal Circuit decision (*Mitchell v. United States*, 930 F.2d 893 (1991)). Op. Cert. at 7. It attempts to deny a conflict between *Ward* and the Federal Circuit's decision below because the cause of action here arises under the Fair Labor Standards Act, while in *Ward* the employee filed suit under the Administrative Procedure Act. The government suggests that in *Ward*, the claim for backpay was "ancillary" to the plaintiff's challenge to his removal, which arose under the APA. *Id.* at 8. On the other hand, in this case, the government contends, the underlying cause of action is for monetary loss. *Id.*

These contentions are meritless. In fact, the Second Circuit in *Ward* did not concern itself at all with whether the backpay claim there could be characterized as "ancillary" to the plaintiff's challenge to his removal.[4] Instead, its focus was upon whether a statute other than

[4] The government's premise—that the monetary relief sought in *Ward* was somehow more "ancillary," than the monetary relief the employees seek here—is questionable. In both cases, in addition to backpay, the employees seek a prospective change in their employment status. In *Ward*, the employee sought backpay and reinstatement based upon a ruling that his discharge was illegal. Here, the employees seek backpay and a change in their FLSA status from exempt to non-exempt, based upon a ruling that their positions do not fit the legal criteria for exemption.

the Tucker Act provided a grant of subject matter jurisdiction over the monetary claim and whether an independent waiver of sovereign immunity existed.

In any event, the distinction the government identifies is contrived. In *Bowen v. Massachusetts*, this Court explained that Tucker Act jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910, n.48. The Court so found because the Tucker Act contains no language suggesting that it displaces an otherwise valid exercise of district court jurisdiction. *Id.* The Court's reasoning—that the Tucker Act does not displace an otherwise valid exercise of jurisdiction by the district court—applies whether a monetary claim can be characterized as "ancillary" to a non-monetary one, or whether money is the sole relief sought in the case. *Ward* conflicts with the decision below because it explicitly rejects the Federal Circuit's central premise—that in suits against the United States seeking monetary relief—only the Tucker Act provides a basis for district court jurisdiction.

In short, because the FLSA (as even the court below agreed) contains an independent waiver of sovereign immunity, the reasoning of *Ward* dictates that a district court can exercise jurisdiction under the federal question statute. *Ward* thus plainly collides with the Federal Circuit's decision here holding that, notwithstanding the FLSA's waiver of sovereign immunity, the Tucker Act provides the exclusive basis for jurisdiction over federal employees' FLSA claims.[5]

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[5] In our opening brief (at pp. 11-12), we showed that finding Tucker Act jurisdiction exclusive would undermine FLSA enforcement because of the Tucker's Act's peculiar venue provisions and its provision for centralized appellate review in the Federal Circuit. We made those points to show the importance of the jurisdictional issue decided by the Federal Circuit, and not, as the

CONCLUSION

The petition for a writ of certiorari should be granted.

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government suggests (Op. Cert. at 12), to propose that federal question jurisdiction can be premised upon the desirability of that result.

With respect to appellate review, the government takes issue with our contention that resolution of federal sector FLSA cases requires application of the same principles that the regional circuits apply to private sector cases, so that centralization of review would be counterproductive. It notes that the FLSA "contemplates a separate system of administration in the case of federal employment." Op. Cert. 13, citing 29 U.S.C. 204(f). This observation is misleading; as the D.C. Circuit found in *American Federation of Government Employees v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), the legislative history of the FLSA shows that while Congress intended the Office of Personnel Management to issue FLSA regulations in the federal sector, it intended those regulations and its administration of the FLSA to be consistent with that of the private sector.